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Abstract

A state supreme court justice allegedly makes improper advances toward a female court employee.

KEYWORDS: employment, decisions, immunity

An Argument Against Judicial Immunity for Employment Decisions

A state supreme court justice allegedly makes improper advances toward a female court employee. When the justice is rebuffed, he pres-

sures a court clerk to fire the woman.[1]

The woman, even if she could prove that she was wronged, might have no damages remedy in the courts. This unfortunate circumstance may occur if the United States Supreme Court affirms a recent court of appeals decision.[2]

The role of the judge is to decide cases on the basis of the facts and the law. For this reason, judges have traditionally been held immune from being sued[3] for actions related to their official duties. Were it otherwise, judges might in deciding cases be influenced by the possibility of future litigation against the judge him- or herself.

The Supreme Court has given strong support to the doctrine of absolute judicial immunity. The Court stated in 1980 that "[j]udicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without being mulcted for damages . . . ."[4]

The scope of judicial immunity has been much debated in recent years.[5] One of the most perplexing issues involving judicial immunity will soon be addressed by the Supreme Court: Are judges immune from suits based on their employment decisions?[6] As the notion that employment decisions should not be made on the basis of certain illegitimate factors—such as race, sex, and national origin—has become widely accepted, judges have increasingly become the subject of law suits by former employees claiming that their discharges were for unlawful reasons. Some courts have held that judicial immunity extends to

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1. *See Misconduct Charged on Vermont High Court*, N.Y. Times, Jan. 29, 1987, at 1, col. 2.

2. Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987).

3. Judges are not only immune from liability; they are also immune from having to go to trial. Mitchell v. Forsyth, 472 U.S. 511 (1985).

4. Dennis v. Sparks, 449 U.S. 24, 31 (1980).

5. *See, e.g.*, Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980); Rosenberg, *Whatever Happened to Absolute Judicial Immunity?*, 21 HOUS. L. REV. 875 (1984); Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503 (1985).

6. It appears that the only scholarly discussions of the issue are a few brief references in Note, *supra* note 5, at 1509-11. It should be noted, though, that the opinions in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987), authored by Judges Jesse E. Eschbach and Richard Posner, would be serious and important contributions to the debate, even if they appeared in a law review instead of the *Federal Reporter*.

employment decisions, while others have held that judges may be sued.

The conflict on this issue is demonstrated by two decisions issued five days apart in June 1986 by the United States Court of Appeals for the Seventh Circuit. In the first case, *Forrester v. White*,[7] a panel of the court held that an Indiana juvenile court judge could not be sued for alleged sex discrimination in dismissing a probation officer. A different panel of the court then ruled in *McMillan v. Svetanoff*[8] that a court reporter claiming that her dismissal was based on her race and political affiliation could sue the judge who fired her. The *McMillan* court tried to reconcile its opinion with the earlier decision,[9] but in fact the two opinions represent vastly different points of view. The Supreme Court denied certiorari in *McMillan*,[10] but has agreed to hear *Forrester*.[11]

This paper contains a survey of Supreme Court decisions on judicial immunity. This is followed by an examination of the ways in which lower courts have interpreted judicial immunity, both generally and in the context of cases alleging employment discrimination by judges. Arguments for and against immunity for employment decisions will be discussed. In conclusion, an argument will be made that the historical origins and policy bases for judicial immunity are not implicated in employment decisions; further, such immunity would be unfair and would lower respect for the judiciary. Finally, granting judicial immunity for employment decisions would be such a difficult task, with decisions made largely on a case-by-case basis, that judges would be faced with as much uncertainty as if there were a blanket denial of immunity for employment decisions.

I. A History of Judicial Immunity

The Supreme Court has based its support of judicial immunity on precedent in the common law. The Court in 1871 said that judicial immunity "has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the

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7. 792 F.2d 647 (7th Cir. 1986) (issued June 5). The plaintiff's petition for a rehearing *en banc* was denied on September 11, 1986. Conversation with Clerk's Office, January 6, 1987. Certiorari was granted on Feb. 23, 1987. 107 S. Ct. 1282. The case will likely be argued in late 1987.

8. 793 F.2d 149 (7th Cir.) (issued June 10), *cert. denied*, 107 S. Ct. 574 (1986).

9. *Id.* at 152. *See also infra* note 107 and accompanying text.

10. 107 S. Ct. 574 (1986).

11. 107 S. Ct. 1282 (1987).

courts of this country."[12] Recent scholarship has argued that in fact the case for immunity on historical grounds is "inconclusive and unpersuasive."[13] Whichever is correct, judicial immunity has been well-established in the United States for over a century.

The Supreme Court first discussed judicial immunity in the 1868 case of *Randall v. Brigham*.[14] An attorney sued the judge who prohibited him from practicing law. The judge was held to be immune, as judges "are not liable to civil actions for their jurisdictional acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly."[15] Three years later the Court partially receded from this holding, and said that intent was irrelevant; there would be immunity even if the judge acted with malice.[16]

The Supreme Court next dealt with judicial immunity in 1879 in *Ex Parte Virginia*.[17] The case was a criminal action against a judge who had excluded blacks from juries.[18] The judge, serving time in prison, filed a habeus petition to gain his release. The Court rejected his claim of judicial immunity, holding that the judge in selecting jurors was engaged in a ministerial (rather than a judicial) act.[19]

The next important Supreme Court case on judicial immunity was *Pierson v. Ray*[20] in 1967. The Court held that 42 U.S.C. § 1983, part of the Civil Rights Act of 1871, did not abolish common law judicial immunity.

The Court's most important immunity decision was in the 1978

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12. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).
13. Feinman and Cohen, *supra* note 5, at 204. *Contra* Block, *supra* note 5.
14. 74 U.S. (7 Wall.) 523 (1868).
15. *Id.* at 536.
16. *Bradley*, 80 U.S. (13 Wall.) at 347. The case involved the trial of John H. Suratt for the murder of Abraham Lincoln. The attorney for Suratt allegedly insulted the judge, who then removed the attorney's name from the list of attorneys permitted to practice in the court. The Supreme Court held that the judge could not be sued for damages.
17. 100 U.S. 339 (1879).
18. While this was a criminal case, it remains relevant to a consideration of immunity from civil suits. *See infra* note 168.
19. *Id.* at 348. Another Supreme Court case on judicial immunity, of lesser importance, is Alzua v. Johnson, 231 U.S. 106 (1913) (immunity for judge alleged to have altered decision reached by other judges, prepared a decision with false statements, and mislead other judges into believing facts in opinion were correct).
20. 386 U.S. 547 (1967).

case of *Stump v. Sparkman*.[21] The defendant was a judge who approved a mother's request that her daughter be sterilized. Several years later the daughter sued the judge. In a five-to-three decision, the Court held that the judge was immune from suit. The majority opinion by Justice White established a two-part test for determining whether a judge is immune. A judge will be immune from suit for damages unless he or she acted in the "clear absence of all jurisdiction"[22] (referring to subject matter jurisdiction); the second requirement is that the act complained of have been "judicial" in nature.[23] The jurisdictional question is often answered by reference to statute.[24] What constitutes a judicial act is more difficult to determine.

The Court provided a standard for judicial acts:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.[25]

The decision has been much criticized. First, it is not always clear what the Court was saying. For example, the standard for judicial acts quoted above is important, but is stated in an awkward, convoluted manner. Second, the decision left many questions unanswered. "[T]he brief legacy of *Sparkman* has been disarray and dissatisfaction."[26]

At issue in *Supreme Court v. Consumers Union*[27] was a suit against state supreme court justices for disciplinary rules covering the conduct of attorneys. The United States Supreme Court held that the state supreme court justices were acting in a legislative function, and hence were not entitled to absolute judicial immunity.[28] In *Dennis v. Sparks*[29] the Court held that there was immunity for a judge who allegedly issued an injunction as a result of a conspiracy between the

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21. 435 U.S. 349 (1978).
22. *Id.* at 357.
23. *Id.*
24. *Id.* at 358.
25. *Id.* at 362.
26. Block, *supra* note 5, at 920. *See also* Feinman & Cohen, *supra* note 5, at 202-03 ("commentators unanimously have condemned the decision").
27. 446 U.S. 719 (1980).
28. *Id.* at 731, 737.
29. 449 U.S. 24 (1980).

judge and some of the defendants. Most recently, the Court in the 1984 case of *Pulliam v. Allen*[30] ruled that judicial immunity is a protection only against damages; there is no judicial immunity against injunctive relief.[31] The Court also held that a claim against a judge for injunctive relief can give rise to an award of attorney's fees under 42 U.S.C. § 1983.[32]

Based on Supreme Court precedent, the law of judicial immunity can be summarized as follows: Judges are immune from suit for damages as long as they are acting within their subject matter jurisdiction and are engaged in judicial acts. If the acts are clearly beyond their jurisdiction, *or* if they are nonjudicial, there is no immunity.[33] It is irrelevant whether the judge acted with malice. The immunity does not extend to injunctive or declaratory relief. Attorney's fees may be assessed against a judge. The crucial undecided question, in the context of immunity for employment decisions, is the definition of a "judicial act."

II. The Difficulty of Defining a "Judicial Act"

A scholar has written of the experience of the British courts at the end of the nineteenth century: "Various definitions of a judicial act were developed; often, when a definition appeared patently unsuitable in a particular context, the courts would discard it and adopt another definition, also supposedly universal in its application."[34] American courts have met with no greater success.

The Supreme Court's standard for judicial acts, stated in *Sparkman*[35] and quoted above,[36] has not been of much help. The term "judicial act" is by no means self-evident, the Seventh Circuit has said.[37] The test is stated so that little is held to be nonjudicial. According to one commentator, "Only in the most obvious cases . . . will these factors present no problems."[38]

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30. 466 U.S. 522 (1984).
31. *Id.* at 541. The Court noted, though, that such relief will probably not often be awarded.
32. *Id.* at 544. The attorney's fees in the case were assessed against the judge.
33. Lopez v. Vanderwater, 620 F.2d 1229 (7th Cir. 1980).
34. Block, *supra* note 5, at 891.
35. 435 U.S. at 362.
36. *See supra* text accompanying note 25.
37. *Forrester*, 792 F.2d at 653.
38. Note, *supra* note 5, at 1507. *Cf.* Feinman & Cohen, *supra* note 5, at 285

Sometimes courts have found parts of the *Stump* test to be irrelevant or "inapplicable."[39] Often lower courts have developed their own tests to judge whether acts are judicial.

The Fifth, Ninth, and Eleventh Circuits have stated four factors to be considered in determining whether a judge's conduct constitutes a judicial act:

> (1) the precise act complained of . . . is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity.[40]

This test has been of limited use. The Supreme Court in *Stump* provided a test, which proved to be inadequate; as a result, several of the courts of appeal have "explained" the *Stump* test in the test quoted just above; but this test has also proved to be inadequate. Some courts have just about given up, admitting that in this area of the law cases are decided without any clear standards.

The Fifth Circuit has been most forthright in its admission that there are no real standards for determining what constitutes a judicial act. In 1985 the court stated that while the four-part test will often work, "it is not the only test, and each of its factors are not to be given equal weight in all cases."[41] "[T]here are situations in which immunity must be afforded even though one or more of the . . . factors fails to obtain."[42] In each case the factors should be "construed . . . generously to the holder of the immunity and in the light of the policies underlying judicial immunity."[43]

("A rule that a judge will be immune for any 'judicial act' is practically indisputable on its face, and a court predisposed to immunity will need little justification to find without reference to policy that anything short of a physical assault is a judicial act.").

39. *Lopez*, 620 F.2d at 1235.

40. Dykes v. Hosemann, 776 F.2d 942, 946 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 569 (1986). The test has also been used in Holloway v. Walker, 765 F.2d 517, 524, *reh'g en banc denied*, 773 F.2d 1236 (5th Cir.), *cert. denied*, 106 S. Ct. 605 (1985); Adams v. McIlhany, 764 F.2d 294, 297, *reh'g en banc denied*, 770 F.2d 164 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 883 (1986); Harper v. Merckle, 638 F.2d 848 (5th Cir. Unit B 1981); Ashelman v. Pope, 793 F.2d 1072, 1075-76 (9th Cir. 1986) (en banc); Harris v. Deveaux, 780 F.2d 911, 914 (11th Cir. 1986).

41. *Holloway*, 765 F.2d at 524.

42. *Adams*, 764 F.2d at 297.

43. *Id.*

It is of course important that tests be flexible and able to adapt to new circumstances. This four-part test, however, is so flexible and so without standards that it is not a test in any real sense. The Fifth Circuit requires that the four factors be applied to the facts of the case. If the result is a finding of no immunity, the factors are reweighed so that the result is a finding of immunity. If one factor overwhelmingly suggests that there should be no immunity, then perhaps that factor should be disregarded. In short, this is less of a test than it is an obstacle for plaintiffs, and the obstacle seems almost insurmountable.[44]

A redefinition of "judicial acts" is beyond the scope of this Note.[45] This description of the courts' writings on the definition of judicial acts is included to place in perspective the problems that the courts have in deciding on immunity for employment decisions. "Universal"[46] rules may not be a realistic goal in this area.

III. The Lower Courts on Judicial Immunity for Employment Decisions

The courts have been unable to arrive at a consensus on the issue of judicial immunity for employment decisions. "The federal courts disagree on the scope of the immunity defense for decisions regarding judicial personnel."[47]

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44. *Cf.* McMillan v. Svetanoff, 793 F.2d 149, 154 (7th Cir.) ("The consensus of these cases is that judicial immunity should not be extended lightly . . . . "), *cert. denied*, 107 S. Ct. 574 (1986). For a discussion of burdens and immunity, see *infra* notes 87 to 89 and accompanying text.

45. *Cf.* Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503 (1985).

46. *See supra* text accompanying note 34.

47. *Forrester*, 792 F.2d at 653-54. Five days later, another panel of the Seventh Circuit wrote that "[m]ost court decisions interpreting judicial acts in the context of judges' hiring and firing decisions have not extended judicial immunity protection." *McMillan*, 793 F.2d at 151. While both statements may be correct, they certainly view the decisions from different perspectives. This is perhaps just another example of the lack of consensus.

Another example of this can be seen in Cronovich v. Dunn, 573 F. Supp. 1330 and 573 F. Supp. 1340 (E.D. Mich. 1983). In the first opinion the judge stated that the defendant/judge was not entitled to immunity. Twenty days later the judge released a second opinion. "I have found on further review of the cases that there is some confusion over the scope of the immunity granted judges in making personnel appointments. The cases are not as crystal clear as I initially thought." 573 F. Supp. at 1342.

A. *Disagreement in the Lower Courts*

Sixteen federal district courts, six federal courts of appeal, and one state supreme court have been confronted with the issue of judicial immunity for employment decisions. No consensus has been reached.

Six courts have either dodged the issue of immunity or not mentioned it at all. The plaintiffs in these cases were a juvenile detention officer,[48] a class of government employees,[49] adult probation officers,[50] a juvenile probation officer,[51] an assistant director of criminal probation,[52] and a law assistant.[53]

Nine courts have *granted* immunity. The plaintiffs in those cases were a judge alleging discriminatory assignments,[54] attorneys alleging discrimination in assignment to criminal cases,[55] an employee of a probation department,[56] a magistrate denied reappointment,[57] an assistant

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48. Mason v. County of Delaware, 331 F. Supp. 1010, 1017 (E.D. Pa. 1971) (earliest case) (suit dismissed for lack of jurisdiction and failure to state a claim; "it is not clear whether [judicial] immunity would extend to the administrative duties of hiring and firing").

49. Nowlin v. Pruitt, 8 Emp. Prac. Dec. (CCH) ¶ 9554 (N.D. Ind. 1974) (second earliest case) ("plaintiffs should carefully delineate a path around such a well established concept [as judicial immunity]").

50. Shore v. Howard, 414 F. Supp. 379, 386 n.3 (N.D. Texas 1976) ("the availability of judicial immunity for suits in damages for hiring or dismissing employees would require a careful weighing of the circumstances under which each suit might arise. The Court does not reach this question in the present action . . . .").

51. Atcherson v. Siebenmann, 605 F.2d 1058, 1064 & n.8 (8th Cir. 1979) (judge held to be entitled to qualified immunity, so issue of absolute immunity not reached), *reversing* 458 F. Supp. 526 (S.D. Iowa 1978). *Cf.* Ohse v. Hughes, No. 85-3074 (7th Cir. Apr. 1, 1987) (available May 14, 1987 on Westlaw) ("the *Atcherson* court ducked the question").

52. Pruitt v. Kimbrough, 536 F. Supp. 764 (N.D. Ind. 1982) (issue not discussed), *aff'd mem.*, 705 F.2d 462 (7th Cir. 1983). *See infra* note 58.

53. Mareno v. Re, 568 F. Supp. 17, 22 n.1 (S.D.N.Y.) ("Having rejected plaintiff's claim on the merits, I need not reach defendant's alternative contention, that the action is barred by the doctrine of judicial immunity."), *aff'd mem.*, 742 F.2d 1430 (1983), *cert. denied*, 465 U.S. 1008 (1984).

54. Wright v. Patrolmen's Benevolent Ass'n, 9 Emp. Prac. Dec. (CCH) ¶ 10,240 (S.D.N.Y. 1975).

55. Thompson v. District of Columbia, 22 Emp. Prac. Dec. (CCH) ¶ 30,840 (D.D.C. 1980).

56. Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983).

57. Lewis v. Blackburn, 555 F. Supp. 713 (W.D.N.C. 1983). This decision was affirmed, 734 F.2d 1000 (4th Cir. 1984), in an opinion in which the court said that "monetary damages are barred by Judge Snepp's judicial immunity." *Id.* at 1008. That

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director of criminal probation,[58] two probation officers,[59] a personal secretary to a judge,[60] and a court services officer.[60.1]

Eight courts have *denied* immunity. The plaintiffs in these actions were a probation officer,[61] a director of a program on aging,[62] a staff attorney,[63] a friend of the court,[64] a hearing officer in a juvenile division,[65] a group of employees (probation officers, assistant superintendent, and teacher) at a juvenile center,[66] a court reporter,[67] and a personal and confidential secretary to a judge.[67.1]

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panel decision was then reversed on other grounds by the court *en banc*. 759 F.2d 1171 (4th Cir. 1985). Certiorari was denied. 106 S. Ct. 228 (1985).

58. Pruitt v. Kimbrough, 665 F.2d 1049 (7th Cir. 1981) (unpublished order, quoted in Cronovich v. Dunn, 573 F. Supp. 1340, 1343 (E.D. Mich. 1983)). This order by the court of appeals was followed the next year by an opinion of the district court in which the issue of immunity was not discussed; the district court, though, seemed to suggest that the issue was unresolved. Pruitt v. Kimbrough, 536 F. Supp. 764, 767 (N.D. Ind. 1982).

59. Forrester v. White, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987); Bryant v. O'Connor, No. 85-4348 (D. Kan. Dec. 2, 1986) (described in Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file)).

60. Mead v. McKittrick, 727 P.2d 517 (Mont. 1986).

60.1. Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file).

61. Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1978), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979).

62. Clark v. Campbell, 514 F. Supp. 1300 (W.D. Ark. 1981).

63. Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

64. Cronovich v. Dunn, 573 F. Supp. 1330 (E.D. Mich. 1983). Twenty days later the court retreated a bit, and noted that the issue of immunity may be the subject of an interlocutory appeal. 573 F. Supp. 1340, 1343.

65. Goodwin v. Circuit Court, 729 F.2d 541, 549 (8th Cir. 1984) ("The decision of whom to retain as a hearing officer is not an official judicial act. It is an administrative personnel decision."), *cert. denied*, 105 S. Ct. 112 (1984) and 105 S. Ct. 1194 (1985). Interestingly, Judge Posner, dissenting in *Forrester*, 792 F.2d at 663, wrote that "a judge's absolute immunity from damage liability for employment discrimination . . . was not argued in Goodwin v. Circuit Court of St. Louis County."

66. Laskowski v. Mears, 600 F. Supp. 1568 (N.D. Ind. 1985). This is the most recent of a number of cases from the Northern District of Indiana on judicial immunity for employment decisions. Earlier cases include: *Nowlin*, 8 Emp. Prac. Dec. (CCH) at ¶ 9554; *Pruitt*, 536 F. Supp. at 764; and *Blackwell*, 570 F. Supp. at 474.

67. McMillan v. Svetanoff, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986).

67.1 Guercio v. Brody, 814 F.2d 1115 (6th Cir. 1987).

Three other decision are difficult to categorize. In Abbott v. Thetford, 534 F.2d

Courts have rarely discussed the immunity issue in depth; rather, they have usually made conclusory statements on whether or not there is immunity.[68] However, a few recent cases granting immunity have developed a policy basis for such immunity.[69] This argument will be considered in Part IV of this Note. First, though, there will be a discussion of the reasons for the lack of consensus: the irrelevance of *Stump v. Sparkman* and analytical flaws of the lower courts.

B. *The Irrelevance of* Stump

Perhaps the most basic reason for the lack of consensus is that the paradigm for judicial immunity cases is irrelevant to the issue of immunity for judicial employment decisions. The *Stump* test has two parts: the judge will be protected by immunity as long as 1) he or she was not acting clearly in excess of jurisdiction, and 2) the acts were judicial.[70]

This test does not adequately deal with cases involving immunity

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1101 (5th Cir. 1976) (en banc, adopting dissenting opinion from panel, 529 F.2d 695 (5th Cir. 1976)), a probation officer was fired for filing a lawsuit on behalf of some children. The probation officer sued the judge for violation of his first amendment rights, but the Fifth Circuit rejected the claim. The court noted the close relationship between probation officers and judges, but seemed to decide the case on constitutional grounds. 529 F.2d at 705-06. One of the concurring judges preferred to decide the case on immunity grounds. 534 F.2d at 1103 (Clark, J., specially concurring). In Sherwood v. Farrar, 9 Emp. Prac. Dec. (CCH) ¶ 10,202 (W.D. Mich. 1975), a clerk-typist sued a judge and the court administrator. The judge did not have to go to trial, as he did not order the plaintiff's dismissal. The court held, though, that the *court administrator* "acted under color of law in discharging the plaintiff. Such an administrative act is not performed in the course of or incident to the actual decision of cases, and is thus not the subject of judicial immunity." *Id.* at page 7906.

In Ohse v. Hughes, No. 85-3074 (7th Cir. Apr. 1, 1987) (available May 14, 1987 on Westlaw), a probation officer was suspended by his supervisor, who wanted to fire the employee. Three judges were chosen to hold a hearing on the probation officer's continued employment. The hearing resulted in the employee's termination. The fired employee sued, but the three judges were protected by judicial immunity, since they were found to have been engaged in judicial acts. "Ohse's hearing had all the elements of a judicial proceeding—counsel was present, witnesses were cross-examined and documentary evidence was received. Importantly, the judges had no personal or professional interaction with Ohse other than when Ohse initiated the interaction through his own letters addressed to them and, of course, through the hearing."

68. *See, e.g., Wright*, 9 Emp. Prac. Dec. (CCH) at ¶ 10,240 (granting immunity), and *Goodwin*, 729 F.2d at 549 (denying immunity).

69. *Blackwell*, 570 F. Supp. at 474; *Pruitt*, 665 F.2d at 1049 (unpublished order quoted in *Cronovich*, 573 F. Supp. at 1343); and *Forrester*, 792 F.2d at 647.

70. *Stump*, 435 U.S. 349, 357-64 (1978).

for employment decisions. The first prong of the test—involving subject matter jurisdiction—seems irrelevant. Some courts simply ignore it.[71] The Seventh Circuit has stated that "in this case a jurisdiction analysis is inappropriate because the discharge decision does not implicate the power of the court—only the authority of the judge to make such an employment decision."[72] Interestingly, five days earlier another panel of the Seventh Circuit tried to squeeze an employment case into the jurisdictional prong of the *Stump* test. The court admitted that the plaintiff's claim "did not arise directly out of litigation before the court, so the question of subject-matter jurisdiction makes little sense."[73] The court went on to apply the test anyway. "In the context of the dismissal of a staff member," the court said, "it is our opinion that the threshold question is this: was the judge *authorized* to discharge the plaintiff?"[74] Not surprisingly, the court found that the judge had the authority.

The court was engaging in a useless charade. It is hard to imagine a scenario in which a judge will have dismissed an employee he or she was without authority to fire. Courts should be forthright and admit, as did the other panel of the Seventh Circuit, that the jurisdiction prong of the *Stump* test is not implicated in the employment cases.

The second prong of the *Stump* test concerns whether the acts were judicial in nature. The general problems with determining which acts are "judicial" have already been discussed.[75] This has been the crucial issue in the employment decisions cases, and a difficult one. Some of the analytical weakness courts have brought to this issue will now be examined. Then, in the next section of this Note, there will be an examination of the policy issues implicated in judicial immunity for employment decisions. Since precedent does not supply a clear answer to the question,[76] the arguments for and against granting immunity will

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71. *E.g.*, *Blackwell*, 570 F. Supp. at 474.

72. *McMillan*, 793 F.2d at 151.

73. *Forrester*, 792 F.2d at 655.

74. *Id.* at 656 (emphasis added). *Accord* Mason v. Twenty-Sixth Judicial District, No. 86-2103-S (D. Kan. Apr. 8, 1987) (available June 6, 1987 on Lexis, Genfed library, Newer file).

75. *See supra* text accompanying notes 34 to 46.

76. Of course, an argument can be made that *Stump* is in fact relevant and controlling on the issue of judicial immunity for employment decisions. According to this argument, *Stump* defines the outer reaches of judicial immunity; since employment decisions are clearly not within the scope of *Stump* immunity, then there can be no immunity.

This argument, while logically strong, may not be well received by the Supreme

then be considered.[77]

C. *Analytical Weaknesses of the Lower Courts in Employment Cases*

In considering whether absolute judicial immunity should be granted for employment decisions, courts have made several errors. They have at times misused state law and have failed to agree whether immunities should be construed narrowly or broadly (and who should carry the burden).

Under the subject-matter jurisdiction inquiry of the *Stump* test, courts sometimes refer to state law to determine whether a judge was acting in the "clear absence of all jurisdiction."[78] This is entirely appropriate, since a state judge's jurisdiction is governed by state law. In fact, the Supreme Court in *Stump* consulted a state statute.[79] Some courts, though, have accepted as controlling a state statute's characterization of an act as either judicial or nonjudicial. For example, the Fifth Circuit Court of Appeals held that in Texas the setting of bond and supervision of court reporters are judicial functions.[80] The cited author-

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Court. First, the Court in reviewing the question is likely to do more than simply consult precedent; instead, it will likely consider the policy bases underlying judicial immunity. Second, the Court has never *explicitly* addressed the question of immunity for employment decisions. The Court has often decided issues that appear—by implication—to have been decided in earlier cases.

77. *See Stump*, 435 U.S. at 368 (Stewart, J., dissenting) ("It seems to me . . . that the concept of what is a judicial act must take its content from a consideration of the factors that support immunity from liability for the performance of such an act."); Block, *supra* note 5, at 915 ("Stewart's dissent in *Sparkman* is noteworthy for suggesting, for the first time, that the limits of judicial immunity should be defined by the policies giving rise to the doctrine."); Butz v. Economou, 438 U.S. 478, 506 (1978) ("federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); *Forrester*, 792 F.2d at 650 ("In deciding whether the district court correctly ruled in Judge White's favor, we must first consider the general principles behind the immunity defense."); Adams v. McIlhany, 764 F.2d 294, 297 (test for judicial act "should be construed . . . in the light of the policies underlying judicial immunity."), *reh'g en banc denied*, 770 F.2d 164 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 883 (1986).

78. *Stump*, 435 U.S. at 357.

79. *Id.* at 358.

80. Slavin v. Curry, 574 F.2d 1256, 1263-64 (suit by litigant, rather than employee), *modified and reh'g denied*, 583 F.2d 779 (5th Cir. 1978).

ity was a Texas statute.[81] Similarly, a federal district court found that a judge was not entitled to immunity because his acts were not judicial. "The defendant in discharging the plaintiff was exercising administrative functions which have been statutorily defined as 'executive powers.' "[82]

These cases are undoubtedly mistaken. A statute cannot make into a judicial act conduct which is nonjudicial in nature. For example, several courts have stated that the punching of a litigant by a judge is clearly a nonjudicial act for which a judge is not entitled to immunity.[83] Were a state legislature to pass a law stating that striking a litigant was "judicial," this should not be determinative. In determining whether an act is judicial, courts should use a federal standard.[84]

This does not mean, though, that courts should not consult state statutes; rather, courts should not accept state *characterizations* of acts as being either judicial or nonjudicial. Some courts have properly used state law. A federal district court stated that to determine whether an act is judicial, "it is necessary to review the [employee's] duties and responsibilities contained" in the state statute.[85] The state law was used to determine what the employee did; the court then properly concluded on its own whether the act was judicial.[86]

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81. TEX. REV. CIV. STAT. ANN. art. 2321 (Vernon Supp. 1978).

82. Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981). The court also noted that judges were required by statute to be bonded before performing those duties described as "executive." *Id.* at 1303. The court said that this showed that the acts must have been nonjudicial; if they were judicial, there would be immunity, and hence the bonding requirement would have been "meaningless." *Id.* One does not need to obtain a bond if one is immune.

83. *E.g.*, Ammons v. Baldwin, 705 F.2d 1445, 1448 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974).

84. Lynch v. Johnson, 420 F.2d 818, 820-21 (6th Cir. 1970).

85. Blackwell v. Cook, 570 F. Supp. 474, 477 (N.D. Ind. 1983).

86. *Id.* at 478 ("The nature of these statutory duties placed on the [employee] indicates that the officer occupies a confidential relationship with the judge"). *Cf. Forrester*, 792 F.2d at 657:

> State law often provides an answer. . . . [I]t may determine, for example, who is in fact a "judge." However, while state law may conclusively determine when a judge is *not* entitled to immunity, . . . it does not always determine when a judge *is* entitled to immunity, because a state may assign a task to a judge for reasons unrelated to safeguarding principled and independent decision-making.

(emphasis in original). *Cf.* Clark v. Tarrant County, 798 F.2d 736, 747 ("While the status of an employee is a question of federal law in determining a Title VII claim, state law is relevant in describing the duties and supervision of the employees."), *reh'g*

Courts have failed to agree on whether judicial immunity should be narrowly or broadly construed, and on which party should carry the burden (this disagreement has not been limited to employment cases). The Supreme Court has clearly stated that "the burden is on the official claiming immunity to demonstrate his entitlement."[87] Despite this, many courts have said that the scope of judicial immunity is to be broadly construed.[88] The Fifth Circuit has said that in judging whether an act is judicial, the four factors "should be construed in each case generously to the holder of the immunity . . . ."[89] It may not be logically impossible to hold that the burden is on the person trying to establish the immunity and that the immunity itself will be "broadly construed"; these two positions are, though, at war with each other. One suggests a preference for denying immunity, while the other suggests a preference for granting it. The lower courts should follow the suggestions of the Supreme Court; the Court has said that the burden is on the judge, so judicial immunity should be narrowly construed.

IV. The Attempt to Expand Judicial Immunity to Employment Decisions

A. *The Policy Bases of Judicial Immunity*

There are many unanswered questions in the area of judicial immunity. One thing is clear, however: the policy considerations that gave rise to absolute judicial immunity are not implicated in employment decisions by judges. Stated differently, when judges formulated the doctrine of judicial immunity, and when the doctrine has been examined in recent years by the Supreme Court, there was no expectation that there would be immunity for employment decisions. As Judge Richard Posner has written, "[i]f there is a case for absolute immunity from civil liability for judges' employment decisions, it is a completely

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en banc denied, 802 F.2d 455 (5th Cir. 1986).

87. Dennis v. Sparks, 449 U.S. 24, 29 (1980) (judicial immunity). *Accord* Butz v. Economou, 438 U.S. 478, 506 (1978) (executive immunity) ("federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope."); Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982) (judicial immunity) ("One claiming immunity has the burden of demonstrating entitlement to it.").

88. *Ashelman*, 793 F.2d at 1078.

89. *Adams*, 764 F.2d at 297.

different case from the traditional one."[90]

Judicial immunity has traditionally existed so that judges could not be sued by dissatisfied litigants. Justice White wrote for the Supreme Court in 1980:

> Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of a case without fear of being mulcted for damages should an unsatisfied litigant be able to convince another tribunal that the judge acted not only mistakenly but with malice and corruption.[91]

The Court earlier stated that the "cluster of immunities protecting the various . . . participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location."[92] The Ninth Circuit has written of "the characteristic of the judicial process that gave rise to the recognition of absolute immunity for judicial officers: the adjudication of controversies between adversaries."[93]

Courts recently deciding judicial employment decision cases have recognized that traditional judicial immunity would not protect employment decisions. In a recent case in which immunity was denied to a judge alleged to have fired a court reporter because of her race and political affiliation, the Seventh Circuit stated that "[p]roviding judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine. The judge will not be more inhibited in rendering decisions because he may be called to task for firing a court reporter."[94] Another panel of the Seventh Circuit, in *granting*

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90. *Forrester*, 792 F.2d at 661 (dissenting).

91. Dennis v. Sparks, 449 U.S. 24, 31 (1980).

92. Butz v. Economou, 438 U.S. 478, 512 (1978). *Cf.* Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978) (discussion of "case" as being a normal attribute of a judicial proceeding).

93. Richardson v. Koshiba, 693 F.2d 911, 914 (9th Cir. 1982). *See also* Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Texas 1976) ("The application of the doctrine of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases.").

94. McMillan v. Svetanoff, 793 F.2d 149, 155 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986). The court continued: "Because allowing judges to hire and fire court reporters with impunity will not further the objectives of the judicial immunity doctrine—principled decisionmaking—we decline to extend it to a judge's decision to terminate a court reporter." *Id. See also* Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir. 1987) ("The basic problem" with extending immunity to employment decisions "is that

immunity, admitted that "the rationale of decisions involving disgruntled litigants is not necessarily applicable to those involving former judicial employees."[95] The court noted that the federal courts have not been able to agree on judicial immunity for employment decisions. "This uncertainty in the case law is understandable, because decisions regarding court personnel depart from the paradigm of *Bradley* and its progeny."[96]

Since advocates of judicial immunity can gain no support from the traditional policy bases of judicial immunity, they have had to develop their own argument for the extension of the doctrine.[97] The case for immunity will be described in the following section. After this the argument's weaknesses will be examined.

B. *The Argument for Judicial Immunity for Employment Decisions*

In *Forrester v. White*[98] the Seventh Circuit Court of Appeals granted absolute immunity to a judge for his actions in firing a woman who worked first as an adult probation officer, then as a juvenile probation officer, and finally as the Project Supervisor of a Juvenile Court Intake and Referral Services Project.[99] This was the first decision in which a court explicitly stated a policy basis for granting judges immunity for their employment decisions.[100]

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it would not serve a central underlying purpose of judicial immunity: promoting fearless and independent decision-making by the judiciary.").

95. *Forrester*, 792 F.2d at 653.

96. *Id.* at 654 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)).

97. Courts increasingly refer to policy considerations when deciding judicial immunity cases. *See supra* note 77.

98. 792 F.2d 647 (7th Cir.), *cert. granted*, 107 S. Ct. 1282 (1987). Judge Jesse E. Eschbach wrote the majority opinion, with which Judge William H. Timbers concurred. Judge Richard Posner dissented.

99. *Id.* at 648-50.

100. Two earlier courts mentioned themes which were later adopted by the *Forrester* court. In Pruitt v. Kimbrough, 665 F.2d 1049 (7th Cir. 1981) (unpublished order quoted in Cronovich v. Dunn, 573 F. Supp. 1340, 1343 (E.D. Mich. 1983)), immunity was granted to a judge. The court said that "[w]e find that the relationship, and the judges' acts of appointing, supervising, and discharging probation officers are intimately related to the judicial process . . . ." Later, a federal district court in Blackwell v. Cook, 570 F. Supp. 474, 479 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1000 (1984), *rev'd en banc on other grounds*, 759 F.2d 1171 (4th Cir. 1985), wrote that "the critical point here is the relationship between probation officer and the judge." "The nature of these

The *Forrester* court wrote that judges must be immune from suits for damages based on many employment decisions because the suits could affect the way judges perform their duties. The court noted that judges must now depend to a considerable extent upon the help of staff[101]— secretaries, clerks, probation officers, bailiffs, staff attorneys, magistrates, friends of the court, juvenile services officers, court reporters. According to the court, "suits brought by former court personnel may have a powerful, albeit indirect, effect on the rights of litigants."[102] The court explained what might happen if judges could be sued for employment decisions:

> The evil to be avoided is the following: A judge loses confidence in his probation officer, but hesitates to fire him because of the threat of litigation. He then retains the officer, in which case the parties appearing before the court are the victims, because the quality of the judge's decision-making will decline.[103]

The court stated that not all employees would be barred from suing. Whether an employee could sue would depend upon that employee's relationship with the judge's judicial duties. "[T]he critical inquiry is whether the person affected by the judge's acts stands in such a relationship to the judicial system as would make immunity appropriate in light of the concerns expressed above."[104] The plaintiff in *Forrester* was barred from suit because the functions that she performed "were inextricably tied to discretionary decisions that have consistently been considered judicial acts."[105] This, according to the court, was the "fundamental factor to consider in deciding whether the defendant was acting in a judicial capacity when he demoted and terminated the plaintiff."[106]

Under the rule of *Forrester*, then, a judge is immune from suit for employment decisions when the employee's relationship is sufficiently related to the judicial acts of the judge. A probation officer might very well be unable to sue; a janitor, on the other hand, would probably face

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statutory duties placed on the probation officer indicates that the officer occupies a confidential relationship with the judge." *Id.* at 478.

101. *Forrester*, 792 F.2d at 654.
102. *Id.*
103. *Id.* at 658.
104. *Id.* at 656.
105. *Id.* at 657.
106. *Id.*

no such obstacle.[107]

C. *Weaknesses of the Argument for Judicial Immunity for Employment Decisions*

The *Forrester* court's argument for absolute judicial immunity has several weaknesses. Each will now be discussed.

1. *Comparisons with the Immunities of Other Branches of Government*

The *Forrester* court considered the immunity accorded to personnel decisions by officials in the other branches of government. Personnel decisions by the President, the court noted, are accorded absolute im-

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107. *See Blackwell*, 570 F. Supp. at 479 ("While the judge and the janitor might *personally* enjoy a close friendship dating back to childhood, that personal relationship would be distinguishable from their occupational relationship.") (emphasis in original).

It is this point that the *McMillan* court—a panel of the Seventh Circuit which, five days after *Forrester* was decided, denied immunity to a judge sued by a court reporter—used to distinguish *Forrester*. The *McMillan* court stated that "*Forrester* goes beyond Blackwell [v. Cook, 570 F. Supp. 713 (W.D.N.C. 1983)] by emphasizing the effect of firing on the judge's ability to render decisions. Because court reporters are not similarly situated such analysis is not dispositive of this case." *McMillan*, 793 F.2d at 152.

While this distinction is valid, the language in *McMillan* makes clear that the *McMillan* and *Forrester* courts view the issue of judicial immunity for employment decisions from vastly different perspectives. For example, the *McMillan* court wrote that "[s]hielding judges from personal liability in their hiring and firing decisions *cannot* outweigh the need to protect the constitutional rights of public employees." *Id.* at 155 (emphasis added). The court continued:

> Certainly the court reporter assists the judge in his or her official capacity, but so does everyone else employed within the judge's chambers—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of the court, janitor—they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions. *Providing judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine.*

Id. (emphasis added).

The Sixth Circuit has stated that "[w]e follow generally the reasoning of the Seventh Circuit's recent decision in McMillan v. Svetanoff . . . ." Guercio v. Brody, 814 F.2d 1115, 1116 (6th Cir. 1987). The Sixth Circuit made no mention of the *McMillan* court's attempt to distinguish *Forrester*.

munity.[108] The law on legislative employment decisions is less clear. In 1979 the Supreme Court bypassed an opportunity to settle the issue.[109] Since then the First Circuit has ruled that the Speaker of the Puerto Rico House of Representatives could not be sued for an employment decision,[110] and the Court of Appeals for the District of Columbia held that an Official Reporter of the United States House of Representatives could not sue for employment discrimination.[111] The D.C. Circuit stated that there would be immunity when an employee's duties were "directly related to the due functioning of the legislative process."[112]

Citing these cases, the *Forrester* court stated that granting immunity to judges "would do no more than extend to the judiciary the immunity from civil damages arising out of certain personnel decisions that is already enjoyed by the coordinate branches."[113]

There are several reasons why this argument is unconvincing. First, as the *Forrester* court conceded,[114] the doctrine of separation of powers mitigates against judicial consideration of employment decisions of the legislative and executive branches. By contrast, the judicial branch would police itself in employment matters; there would be no issue of the separation of powers.

There is another significant difference between immunity for judges and immunity for legislators: Legislative immunity is supported by an explicit constitutional provision—the speech and debate clause.[115] There is no counterpart for judges. Judicial immunity has been a creation of the common law.[116]

Finally, the comparison of different types of immunities is suspect.

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108. *Forrester*, 792 F.2d at 654, citing Harlow v. Fitzgerald, 457 U.S. 800, 811-13 (1982).

109. Davis v. Passman, 442 U.S. 228 (1979). However, in dissent Justices Powell and Rehnquist hinted that they might support immunity for employment decisions by legislators. *Id.* at 254 n.3.

110. Agromayor v. Colberg, 738 F.2d 55 (1st Cir.), *cert. denied*, 469 U.S. 1037 (1984).

111. Browning v. Clerk, 789 F.2d 923, *reh'g en banc denied*, 793 F.2d 380 (D.C. Cir.), *cert. denied*, 107 S. Ct. 601 (1986).

112. *Id.* at 929 (emphasis in original removed).

113. *Forrester*, 792 F.2d at 655. "[T]he unifying rationale is that, if an employee's duties are intimately related to the functioning of the particular process (whether executive, legislative, or judicial on either the federal or state level), then personnel decisions regarding that employee are also part of the process." *Id.*

114. *Id.*

115. U.S. CONST. art. 1, § 6, cl. 2.

116. *See* Feinman & Cohen, *supra* note 5.

The immunities seem to have developed independently of each other.[117] More importantly, "[b]ecause the administrative and judicial systems are so dissimilar, the policy determination of an appropriate rule must include different factors."[118]

2. *Injunctive Relief*

It is well-established that judicial immunity serves as a bar only to damages. The Supreme Court stated in 1984 that "[j]udicial immunity is not a bar to prospective injunctive relief against a judicial officer . . . acting in her judicial capacity."[119] In an employment case injunctive relief could include a former employee's reinstatement to the position under the judge.[120] That such relief is unlikely to be granted is irrelevant; a judge would nonetheless have to go to trial, and reveal his reasons for employment decisions. This would, of course, work against the stated goal of those who argue for judicial immunity for employment decisions.

Courts could rule that injunctive relief may *never* be awarded against a judge in an employment case. There are two problems with this. First, this would be contrary to the recent Supreme Court decision on the availability of injunctive relief.[121] Second, the need to change a well-accepted part of judicial immunity is an indication that the damage done to the doctrine of judicial immunity by extending it to employment decisions may be difficult to predict beforehand. The doctrine may be a house of cards; if one starts playing with one card, the effect on the others may be substantial.

3. *The Availability of Other Remedies*

Courts are in disagreement on whether the availability of other remedies should be considered in determining whether judicial immunity is to be granted. In *Stump v. Sparkman*[122] there was no alternative remedy, but the Supreme Court nevertheless granted immunity. The plaintiff was a girl who had been sterilized without proper judicial

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117. *Id.* at 204 n.8.
118. *Id.*
119. Pulliam v. Allen, 466 U.S. 522 (1984).
120. Under Title VII, "front pay" is prospective injunctive relief, and as such could be assessed against a judge. *See infra* note 135. "Backpay" would be unavailable.
121. *Pulliam*, 466 U.S. at 522.
122. 435 U.S. 349 (1978).

procedure. There was, of course, no way to reverse what had been done to her. Justice Powell wrote in dissent that underlying the doctrine of judicial immunity, beginning with *Bradley v. Fisher*,[123] "is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist *alternative forums and methods for vindicating those rights*."[124] Justice Powell added that "where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption . . . is inoperative."[125]

Three months after *Stump* was decided, the Supreme Court (through Justice White, who also wrote the *Stump* decision) stated that "correctability of error on appeal" is one of the many checks on malicious actions by judges that tend to "reduce the need for private damages actions as a means of controlling unconstitutional conduct."[126] This was reiterated in 1985.[127] On the other hand, in 1984 Justice Powell wrote in dissent that *Stump* "indicates that judicial immunity does not depend upon the availability of other remedies."[128] The Justice said this in a footnote, however; the text mentioned that "[a]dequate remedies were expressly available . . . ."[129]

The lower courts have followed the Supreme Court in being inconsistent in their treatment of the importance of other remedies. Some courts have denied immunity and given as one reason the unavailability of other remedies.[130] Other courts have said that alternative remedies are irrelevant, but pointed out that they existed in the case under

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123. 80 U.S. (13 Wall.) 335 (1871).

124. *Stump*, 435 U.S. at 370 (Powell, J., dissenting) (emphasis added).

125. *Id.*

126. Butz v. Economou, 438 U.S. 478, 512 (1978). *See also* Block, *supra* note 5, at 924 ("The availability of appellate correction of error is . . . absolutely central to the logic of judicial immunity.").

127. Cleavinger v. Saxner, 106 S. Ct. 496, 501 (1985).

128. *Pulliam*, 104 S. Ct. at 1987 n.13 (Powell, J., dissenting).

129. *Id.* at 1987.

130. *E.g.*, *McMillan*, 793 F.2d at 155 (judicial employment decision) ("Unlike situations more closely aligned with the judicial process, there is no other adequate means of review for a judge's possible constitutional violations."); Atcherson v. Siebenmann, 458 F. Supp. 526, 538 (S.D. Iowa 1978) (judicial employment decision) ("The decision in this instance was not subject to a judicial appeal . . . ."), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979); Cronovich v. Dunn, 573 F. Supp. 1330, 1336 (judicial employment decision) ("There is no right of appeal from the decision."), *modified*, 573 F. Supp. 1340 (E.D. Mich. 1983).

consideration.[131]

There may at times be an alternative remedy available for judicial employees fired for illegal reasons. Judge Posner, dissenting in *Forrester*, wrote that a wrongfully-discharged probation officer has administrative and judicial remedies against the employing agency—the court, rather than the judge.[132] He added, though, that the remedy was limited to equitable relief: "the fired employee can get reinstatement with back pay but cannot get common law damages."[133] Courts, however, may hesitate to require an employer to rehire an employee who left on bad terms or whose job involved confidential information.[134] For this reason, there may not be any adequate remedy available to employees fired by judges but unable to sue because of judicial immunity.[135] This is another reason why courts should not grant judges immunity for their employment decisions.

4. *Remedies for Sexual Harassment*

In recent years sexual harassment in the workplace has received much attention.[136] Courts have granted remedies to employees who

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131. *Browning*, 789 F.2d at 930 (legislative employment decision). "Although we are not suggesting that a lack of alternative remedies would alter our decision today, we note that Congress has provided for internal procedures to address complaints such as [the plaintiff's]." The court stated, though, that it was unclear whether damages could be obtained from the procedure. *Id.* at 931.

132. *Forrester*, 792 F.2d at 662 (Posner, J., dissenting). *Cf. McMillan*, 793 F.2d at 155 ("normally the only means an at-will employee has to question and correct the motives of a judge's employment decisionmaking is a civil rights suit.").

133. *Forrester*, 792 F.2d at 662 (Posner, J., dissenting).

134. *See* 2 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 55.21, at 11-25 (1986) ("The fact that the position involved handling of confidential information has contributed to the denial of reinstatement, when it was apparent that trust had been eroded by the litigation").

135. However, under Title VII a dismissed employee may be able to gain "front pay"—that is, pay extending beyond the date of the court decision. A. LARSON & L. LARSON, *supra* note 134, at § 55.39, at 11-80.59. This is considered to be injunctive relief, *id.* at § 55.39, 11-80-60, and hence could be assessed against a judge. *See* Pulliam v. Allen, 466 U.S. 522, 541 (1984) (judicial immunity not a bar to *prospective* injunctive relief).

Most judicial employees are probably not, though, covered by Title VII; the statute does not cover employers with fewer than fifteen employees, 42 U.S.C. § 2000e(b), or an "immediate advisor" to a state elected public official. 42 U.S.C. § 2000e(f).

136. *E.g.*, Cook, *The New Bias Battleground: Sex Harassment*, Nat'l L.J., July 7, 1986, at 1.

have been subjected to sexual harassment.[137] One small aspect of judicial immunity for employment decisions is that there may not be any damages remedy for confidential judicial employees who are sexually harassed by a judge. For example, a law clerk—because of his or her close relationship to the decisionmaking process—would probably not be able to sue a judge for damages under *Forrester*; if the clerk was the victim of sexual harassment, there would be no remedy other than injunctive relief.[138]

The cases so far that have concerned judicial immunity for employment decisions all involved hiring, firing, or worker assignment decisions. It might be much more difficult for a court to grant immunity in a case in which the plaintiff was alleging sexual harassment. Immunity for sexual harassment is, though, a logical corollary of immunity for employment decisions.

5. *Congressional Abolition of Judicial Immunity for Actions Under Title VII*

Another reason why judges should be liable for their employment decisions is that this apparently is the will of Congress. In 1972 Congress amended the scope of Title VII to include most state employees.[139] Congress specifically stated which state employees would be covered by Title VII and which would not.

> [T]he term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of the State government, governmental agency or political subdivision.[140]

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137. *E.g.*, Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

138. As discussed *supra* note 135, an employee covered by Title VII may be able to obtain an award of *future* earnings, which is considered to be prospective injunctive relief. Resorting to public opinion, impeachment, or a judicial disciplinary procedure might punish the wrongdoer, but would provide no compensation to the victim.

139. The previous law explicitly excluded all state employees. 42 U.S.C. § 2000e(b) (1971).

Federal employees are not covered by Title VII. 42 U.S.C. § 2000e(b) (1978).

140. 42 U.S.C. § 2000e(f) (1978). For interpretations of this section see

In short, elected public officials, and their personal staff and immediate advisors, are not covered by Title VII.

This specific inclusion of some employees, and exclusion of others, suggests that Congress was abolishing judicial immunity for actions under Title VII. Many judicial employees would be unable to maneuver around the exceptions in the statute; but those who could avoid the exceptions—such as employees of nonelected judges who employed fifteen or more persons—could sue under Title VII.

The question of Congressional repeal of judicial immunity was once before the Supreme Court. The Court in *Pierson v. Ray*[141] ruled that Congress in enacting 42 U.S.C. § 1983 did *not* repeal judicial immunity. According to the Court, "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine."[142] In contrast, the exceptions to Title VII are specifically stated. Congress would not have so clearly stated exceptions to Title VII if it intended that others would continue to exist. The failure to include immunity for all state court judges suggests that Congress intended to abolish broad judicial immunity from Title VII actions against judges.

A determination that state court judges are not automatically immune from suit under Title VII would create a significant inconsistency. An employee fired because of his or her race might be able to sue a judge under Title VII; the same employee fired because of the exercise of constitutional rights—such as freedom of speech—would be barred from suing because of judicial immunity. Violations of Title VII could be remedied, but not violations of the Constitution. This incongruity further suggests the folly of providing widespread judicial immunity for employment decisions.

6. *Judicial Immunity and Respect for the Courts*

Judicial immunity is a balancing of interests—one individual suffers for the greater public good. It is important to recognize, however,

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Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985); Clark v. Tarrant County, 798 F.2d 736, 742-43, *reh'g en banc denied*, 802 F.2d 455 (5th Cir. 1986); Goodwin v. Circuit Court, 729 F.2d 541 (8th Cir.), *cert. denied*, 105 S. Ct. 112 (1984) and 105 S. Ct. 1194 (1985); Marafino v. St. Louis County Circuit Court, 537 F. Supp. 206, 211 (E.D. Mo. 1982), *aff'd*, 707 F.2d 1005 (8th Cir. 1983).

141. 386 U.S. 547 (1967).

142. *Id.* at 554-55.

that respect for the law may decline as people in power are held to be immune from the laws. This important point is rarely stated in majority opinions; more often judges in dissent will express the thought.

Justice Rehnquist, in arguing for wider immunity for executive branch officials, wrote in dissent that the "ultimate irony" of the Supreme Court's decision in *Butz v. Economou*[143] was that "in the area of common-law official immunity, a body of law fashioned and applied by judges, absolute immunity within the federal system is extended only to judges and prosecutors functioning in the judicial system."[144] Justice Rehnquist wrote that he believed that this was so because judges do not understand the pressures and difficult decisions that nonjudicial officers face. "But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as 'lesser breeds without law.' "[145]

Judge Posner, dissenting in *Forrester*, wrote that "federal judges must be sensitive to the accusation of arbitrarily exempting themselves from liabilities which they have imposed in the name of the Constitution on other public officials, state and federal."[146] Similarly, a judge on the Eleventh Circuit, dissenting in a 1985 decision, wrote that "[t]his case also points out the reason citizens and legislators are increasingly demanding that lawyers and judges charged with ethical violations be judged not by other lawyers and judges under the 'good ole boy' system, but by persons outside the legal profession."[147]

This concern that judges may be viewed as the beneficiaries of a double standard is not so strong so as to suggest that there be *no* judicial immunity; but it is important enough that judicial immunity should not be extended lightly. Especially in light of the other weaknesses of the argument for immunity for employment decisions, the concern for the public image of judges and the courts mitigates against expanded judicial immunity.

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143. 438 U.S. 478 (1978).

144. *Id.* at 528 n.* (Rehnquist, J., dissenting).

145. *Id.*

146. *Forrester*, 792 F.2d at 660 (Posner, J., dissenting).

147. Dykes v. Hosemann, 776 F.2d 942, 954 n.1 (11th Cir. 1985) (Hatchett, J., dissenting), *cert. denied*, 107 S. Ct. 569 (1986).

7. *The Speculative Effect of Liability for Employment Decisions*

A central weakness of the argument for judicial immunity for employment decisions is that it requires much speculation. It is by no means clear that a judge's concern over a civil rights or Title VII suit by a former employee will affect the way the judge performs his or her duties and that this in turn will affect the rights of the litigants. Perhaps such a concern will affect the judge—this will be conceded, for the moment. But will this have an effect on the rights of the litigants?

A divorce action filed against a judge would likely have a great effect on the judge; it will be more difficult for the judge to concentrate and keep his or her mind on the judicial work to be done. But there can be no argument made that a judge should be immune from suit for divorce. The argument might be made in response that an employee is closer to the judicial process than a spouse. However, this should not be determinative; if the rights of the litigants are affected, then under the *Forrester* opinion suit should be barred by immunity.

Now if the Supreme Court upholds *Forrester* then judges down the road would of course not be held to be immune from being sued for divorce. This clearly will not happen. The point, though, is that the argument that litigants will suffer if judges can be sued for employment decisions requires a great deal of speculation; the proposition is by no means obvious, despite reassuring words from the *Forrester* majority.[147.1] Immunity is not something to be granted lightly;[148] the need for immunity should be better established before it is extended to employment decisions by judges.

8. *The Unclear Limits of Immunity for Employment Decisions*

A final weakness of the *Forrester* opinion is that it is an opinion whose limits are markedly unclear. The court was careful to limit the opinion to the facts of the case:

> We, of course, express no opinion on other decisions relating to Judge White's staff or even to probation officers in a different court system, because it must be determined in each case that the grant

147.1. *See* Guercio v. Brody, 814 F.2d 1115, 1120 (6th Cir. 1987) ("The integrity and independence of judicial decisionmaking is in no way impaired if judges are called to account for their personnel decisions. Liability for wrongful personnel decisions would not have a chilling effect on the judicial decisionmaking process.").

148. *See supra* notes 87 to 89 and accompanying text.

> of immunity advances the policies behind it. We have, as we must, addressed only the facts of the case before us.[149]

The court also stated that "the nature of this relationship depends on the facts of each case. We cannot set forth a general rule, because the interaction between the judge and the members of his staff does not always appropriately implicate the decisions of the judge *qua* judge."[150]

But as Judge Posner pointed out in dissent, there were few limits to the logic of the majority. "The majority is so intent on writing a narrow opinion that it leaves the scope of its new immunity entirely uncertain. Can it really be that the doctrine is to be limited to the firing of probation officers in Illinois juvenile courts?"[151] Under the majority opinion, immunity would inevitably extend to hiring (as opposed to firing) decisions. Judge Posner noted that "[i]t would be a curious notion that a judge must hire probation officers without regard to their race or sex but is free to fire them on the basis of their race or sex."[152] The immunity would also extend to employees other than probation officers. Law clerks, staff attorneys, and friends of the court, to name a few, are close enough to the judicial process that under *Forrester* they would likely be barred from suing because of judicial immunity. Where the limits will be set, though, is unclear.

The *Forrester* majority's holding that the granting and denying of immunity for judicial employment decisions must be made on a case-by-case basis has a fatal flaw: it undermines the goals of judicial immunity.

First, in determining in a particular case whether a judge is entitled to immunity, courts will have to probe into the way the judge worked with his or her staff. Did the judge rely on the advice of the employee? This would have to be determined before the court could decide the immunity question. The *Forrester* majority's goal is to keep courts away from the sensitive parts of a judge's work. The test they enunciated does not achieve its purpose; it requires probing into the judge's chambers. An example of this is the 1985 case of *Laskowski v. Mears*.[153] The district court noted that in an earlier judicial immunity

149. *Forrester*, 792 F.2d at 658.
150. *Id.* at 657.
151. *Forrester*, 792 F.2d at 664 (Posner, J., dissenting).
152. *Id.* at 659 (Posner, J., dissenting).
153. 600 F. Supp. 1568 (N.D. Ind. 1985).

case[154] a court had imputed a "special status to the judge-probation officer relationship."[155] The *Laskowski* court said that it did not agree with this "rule of thumb."[156] This would be proper under *Forrester*, as cases should be decided on the particular facts. The *Laskowski* court said that "[i]n the case at bar, the facts which might implicate judicial independence are *as yet* undisclosed. I do not know how closely Judge Mears worked with [the plaintiffs]. . . . Summary judgment *at this stage* would be inappropriate."[157] Under the rule set out in *Forrester*, courts would have to probe into the judge's chamber just to determine whether immunity should be granted. This works against the stated goal of the immunity.

The *Forrester* opinion works against the goal of judicial immunity in another way. Immunity is supposed to allow judges to act without concern for later litigation in which they might be defendants. The Supreme Court long ago said that if a judge is concerned that he might be sued, "he would be subjected for his protection to the necessity of preserving a complete record . . . before him of every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show . . . that he decided as he did with judicial integrity . . . ."[158] In short, immunity is to serve as protection against the "chilling effect" posed by the threat of litigation. In a similar vein, the *Forrester* court stated that without immunity a judge might lose confidence in his or her employee, but hesitate to fire him because of the threat of litigation.[159] The incompetent employee will be retained, and the quality of the judge's decision-making will suffer.[160]

The *Forrester* opinion does not guard against this chilling effect, since decisions are to be made on a case-by-case basis. The *Forrester* court noted that "[e]ach court system differs in the manner in which it allocates responsibility to court personnel."[161] The Seventh Circuit stated a half-year before the *Forrester* opinion was announced that "it is impossible to generalize about the nature of an individual type of position, such as bailiff or secretary; job responsibilities and duties can vary greatly between different governmental units or even within a gov-

154. Blackwell v. Cook, 570 F. Supp. 474 (N.D. Ind. 1983).
155. *Laskowski*, 600 F. Supp. at 1574.
156. *Id.*
157. *Id.* (emphases added).
158. Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349 (1871).
159. *Forrester*, 792 F.2d at 658.
160. *Id.*
161. *Id.* at 657-58.

ernmental unit."[162]

The practical effect of the case-by-case approach in *Forrester* is that the only way for a judge to determine whether he or she has immunity for a particular employment decision is to be sued. The "chilling effect" will still be great. The law of judicial immunity under *Forrester* is so vague, so uncertain, so ill-defined, that judges could not act with the assurance that they would be immune from liability for employment decisions. Most judges, knowing the uncertainty in this area of the law, will act as if there were no immunity. In short, not only are the assumptions on which the immunity is based weak; in addition, *Forrester* immunity does not even achieve its stated goals.[163]

V. Conclusion

For all of the reasons discussed above, judges should not be immune from suit for damages for their employment decisions. To grant judges immunity for personnel actions is not warranted by the Supreme Court's opinions on immunity and would be bad policy—the immunity would be unclear in scope, would deny an important remedy to persons whose rights have been violated, and will diminish respect for the judiciary. Further, immunity for employment decisions will not even serve the goals suggested by supporters of the immunity.

There does not appear to be any middle position on judicial immunity for employment decisions. One is either for it or against it. Numerous proposals for altering judicial immunity have been offered. One of the most commonly suggested middle-ground approaches is that under certain circumstances there be immunity only if the judge acted with good faith.[164] This alternative to absolute judicial immunity would not work in employment discrimination cases, however. A finding of unlawful discrimination precludes a finding of good faith. "By defini-

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162. Meeks v. Grimes, 779 F.2d 417, 420 n.2 (7th Cir. 1985).

163. *See Forrester*, 792 F.2d at 664 (Posner, J. dissenting) ("Absolute immunity provides real security only if the scope of the immunity is well-defined. Under the court's approach the process of definition will be protracted and may never yield a clear rule on which employees or job applicants may sue which judges and which may not, and for what.").

There is, of course, one way to avoid the uncertainty that plagues the *Forrester* standard: judges will be immune from suit for *all* employment decisions. This is not an attractive alternative, however.

164. *See, e.g.* Feinman & Cohen, *supra* note 5, at 261-64 (discussing various proposals).

tion, there can be no liability unless the plaintiff shows that the defendant intentionally discriminated against her because of her sex," the Eighth Circuit has said.[165] "If the jury finds that intentional discrimination has occurred, . . . 'good faith' on the part of the defendant is logically excluded."[166] Since the case for absolute judicial immunity is fatally flawed, and since there is no middle-ground alternative, there should be no immunity whatsoever for the employment decisions of judges.

Denying judicial immunity for personnel decisions will also refocus attention on an important yet too often ignored aspect of judicial immunity: the recognition that there is no immunity for ministerial acts. In the 1879 opinion of *Ex Parte Virginia*,[167] the Supreme Court denied immunity to a judge who was charged with excluding blacks from juries.[168] The Court said that the "duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. . . . It is merely a ministerial act. . . . That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?"[169]

Several courts deciding cases involving judicial immunity for personnel decisions have mentioned the ministerial distinction derived from *Ex Parte Virginia*.[170] Often, though, the distinction is not men-

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165. Goodwin v. Circuit Court, 729 F.2d 541, 545-46 (8th Cir. 1984). Intent need not be proven in "disparate impact" cases under Title VII. But it seems likely that practically all litigation against judges would be individual actions, rather than allegations of systemic discrimination.

166. *Id.* at 546. *But see* Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979).

167. 100 U.S. 339 (1879).

168. *Id.* at 349. The judge had been criminally charged, and filed a habeus petition to obtain his release. *Id.* at 340-42. The Court denied the petition, and stated that there was no immunity for ministerial acts. *Id.* at 349. The fact that the case involved criminal charges does not affect the decision's importance for civil immunity cases. Judge Posner noted that *Ex Parte Virginia* involved a criminal prosecution, but said that "it would be surprising if a suit for civil damages brought by the prospective jurors whom the judge had discriminated against would have been deemed barred by the doctrine of absolute immunity." *Forrester*, 792 F.2d at 664 (dissenting).

169. *Ex Parte Virginia*, 100 U.S. at 348.

170. *See, e.g.*, Atcherson v. Siebenmann, 458 F. Supp. 526, 538 (S.D. Iowa 1978) ("ministerial" duty), *rev'd on other grounds*, 605 F.2d 1058 (8th Cir. 1979); Lewis v. Blackburn, 555 F. Supp. 713, 723 (W.D.N.C. 1983) (same), *aff'd*, 734 F.2d 1000 (1984), *rev'd en banc on other grounds*, 759 F.2d 1171 (4th Cir.), *cert. denied*, 106 S. Ct. 228 (1985); Cronovich v. Dunn, 573 F. Supp. 1330, 1337 (same), *modified*, 573 F. Supp. 1340 (E.D. Mich. 1983); Doe v. County of Lake, 399 F. Supp. 553, 556

tioned. One reason for this is that the case which established the modern rule for judicial immunity—*Stump v. Sparkman*[171]—made no mention of the distinction between ministerial and judicial duties. One scholar has written that "[j]udging from the opinion, [Justice] White was not aware of the discussion in *Ex Parte Virginia* when he set down his test for a judicial act; judging from the test itself, White was unaware of the need to distinguish judicial acts from administrative or legislative acts in the context of judicial immunity."[172]

Interestingly, the Seventh Circuit—alone among all courts of appeal—has modified the two-prong *Stump* test to include the ministerial acts distinction. Ten months before *Forrester* was decided the court gave a three-prong test for determining whether an judge's act is judicial, and the first prong was "whether the act or decision involves the exercise of discretion or judgment, or is rather a ministerial act which might as well have been committed to a private person as to a judge."[173] Both this case and *Ex Parte Virginia* are cited together in a footnote in *Forrester*,[174] but the court does not seriously consider this distinction.[175] By contrast, five days later in *McMillan v. Svetanoff*,[176] the same circuit stated that the "[h]iring and firing of employees is typically an administrative task."[177] For the Seventh Circuit, apparently, *Ex Parte Virginia* is worth considering only when it supports the

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(N.D. Ind. 1975) (ministerial or administrative duties); Shore v. Howard, 414 F. Supp. 379, 385 (N.D. Texas 1976) (same); Clark v. Campbell, 514 F. Supp. 1300, 1302 (W.D. Ark. 1981) (same); Mason v. County of Delaware, 331 F. Supp. 1010, 1017 (E.D. Pa. 1971) (administrative duties); Sherwood v. Farrar, 9 Emp. Prac. Dec. (CCH) ¶ 10,202, at 7906 (W.D. Mich. 1975) (same).

The court in Shore v. Howard, 414 F. Supp. at 385, described *Ex Parte Virginia* as "still valid and often-cited." The Sixth Circuit recently stated that hiring and firing confidential personnel is an "administrative act." Guercio v. Brody, 814 F.2d 1115, 1119 (6th Cir. 1987). The court cited *Ex Parte Virginia* with approval. *Id.* at 1117.

171. 435 U.S. 349 (1978).

172. Block, *supra* note 5, at 920-21 (citation omitted). *See also* Note, *supra* note 5, at 1509 n.49 ("*Stump* makes no reference to the *Ex Parte Virginia* distinction" between ministerial and judicial acts). *Cf.* Supreme Court v. Consumers Union, 446 U.S. 719 (1980) (Virginia Supreme Court in regulating the conduct of attorneys held to have been acting in a legislative capacity).

173. Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985) (citing *Ex Parte* Virginia).

174. 792 F.2d at 656 n.10.

175. *See id.* at 656 ("saying that something is an administrative act, as opposed to a judicial one, simply states the conclusion.").

176. 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986).

177. *Id.* at 155.

court's decision.

The importance of the ministerial tasks distinction is that it suggests that some bright lines have been and can continue to be drawn in the area of judicial immunity. A judge should be absolutely immune for judicial rulings, but open to suit for employment decisions, just as would an ordinary citizen. Supreme Court precedent calls for this, and so does elementary fairness.

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